

REMARKS

Claims 22, 28-33, 34, 36, 37 and 68-78 are pending. By this Amendment, claims 65-78 are cancelled without prejudice. New claim 79 is added.

Claim Objections

Claims 65-67 were objected to as depending from a cancelled claim, by this amendment claims 65 and 67 are cancelled without prejudice.

Claim Rejections Under 35 U.S.C. §112

Claim 72 stands rejected under 35 U.S.C. §112, as being indefinite. Claim 72 has been cancelled without prejudice.

Claim Rejections Under 35 U.S.C. §103(a)

Claims 22-32, 34, 37-69, 71-75 and 78 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,549,679 to Kuslich in view of U.S. Patent No. 6,413,536 to Gibson et al. Applicants note that claims 23-27 were cancelled in a Preliminary Amendment on July 16, 2004; claims 38, 52, 63 and 64 were cancelled in the Response to the Restriction Requirement on April 3, 2006; claims 20-21, 35, 39-51 and 53-62 were withdrawn and claims 65-78 have been cancelled without prejudice by the present amendment. Therefore, of the claims standing rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,549,679 to Kuslich in view of U.S. Patent No. 6,413,536 to Gibson et al, claims 22, 28-32, 34 and 37 are currently pending.

In, Kuslich v. Hochschuler, the Board found that claims directed to treating the vertebral body were patentably distinct from the Kuslich '679 Patent which is directed to treating the interbody disc space. *See* Kuslich v. Hochschuler, Interference No. 105,252, p.13 (BPAI 2005). The claims directed to treating the vertebral body that were included in the Kuslich Interference are set to issue in U.S. Patent Application No. 10/440,036. The claims of the present application were awarded to Spineology as part of the resolution of the Kuslich Interference.

Applicants believe the present claims are patentably distinct from the Kuslich '679 Patent and the claims of the Kuslich 10/440,036 Application. Claims 22, 28-32, 34 and 37 are directed to treating a vertebral body, not the interbody disc space. As such, claims 22, 28-32, 34 and 37 are patentably distinct from the Kuslich '679 Patent which discloses treating the disc space. The Gibson '536 Patent is directed to a specific liquid fill material and does not disclose a container as recited in claims 22, 28-32, 34 and 37. Further, claims 22, 28-32, 34 and 37 require the injection of a first and second bone filler material. There is no disclosure in the Kuslich '679 Patent or the Kuslich 10/440,036 Application of injecting a first and second bone filler material. Based on the foregoing, Applicants respectfully submit that claims 22, 28-32, 34 and 37 are in condition for allowance.

Finally, claims 33 and 36 were not rejected and as such Applicants respectfully submit they are in condition for allowance.

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

The Examiner is invited to telephone the undersigned if the Examiner believes it would be useful to advance prosecution.

Respectfully submitted,



Wendy J. Cusick  
Registration No. 52,788

Customer No. 24113  
Patterson, Thunte, Skaar & Christensen, P.A.  
4800 IDS Center  
80 South 8th Street  
Minneapolis, Minnesota 55402-2100  
Telephone: (612) 349-3019